No. 12,158

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BAKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, deceased, and BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, deceased, *et al.*,

Appellees.

MEMORANDUM OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION IN RESPONSE TO REPLY BRIEF OF APPELLANTS RE APPLICATION OF MORATORIUM ACT TO PRIVATE SUITS

JOSEPH W. BURNS
Fulton, Walter & Halley
30 Rockefeller Plaza
New York 20, N. Y.

MICHAEL F. McCARTHY
Oliver & Donnally
110 East 42nd Street,
New York 17, N. Y.

CHARLES A. BEARDSLEY
Central Bank Building
Oakland 12, California
Attorneys for Appellee American Potash & Chemical Corporation

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vs.

Borax Consolidated Ltd., *et al.*,
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MEMORANDUM OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION IN RESPONSE TO REPLY BRIEF OF APPELLANTS RE APPLICATION OF MORATORIUM ACT TO PRIVATE SUITS

Appellants' Reply Brief states (page 26) that this appellee contends that the Moratorium Act of October 10, 1942, does not mean what it clearly states. It is submitted that appellants failed to apprehend what the Act clearly states. What the Act means is shown by analysis of its wording, by analysis of its legislative history, and by analysis of its policy. Failing to find any support for their construction of the statute in its legislative history, they have attempted to confuse this Court by referring to the legislative history of an entirely different bill (S. 2431) and making the entirely erroneous statement that the moratorium statute was the result of a "compromise".

(a) THE WORDING OF THE ACT OF OCTOBER 10, 1942 SHOWS CLEARLY THAT PRIVATE ACTIONS ARE NOT INCLUDED.

Legislative words presumably have meaning and courts must try to find it. The statute in question here reads:

> "The running of any existing Statute of Limitations applicable to *violations* of the antitrust laws of the United States, now indictable or subject to civil proceedings . . . shall be suspended . . ." (Italics supplied).

Obviously the limiting clause "now indictable or subject to civil proceedings" has a purpose. Surplus words cannot be attributed to statute draftsmen. *D. Ginsburg & Sons* v. *Popkin,* 285 U. S. 204, 76 L. Ed. 704, 52 S. Ct. 322 (1932); *Platt* v. *Union Pacific Ry. Company,* 99 U. S. 48, 25 L. Ed. 424 (1879). If this clause were omitted from the statute, then the statute might have the meaning for which appellants contend; it might include private-party treble damage suits because it would include *all* suits under the antitrust laws. But the clause was deliberately inserted. Its purpose was to exclude *some* litigation under the antitrust laws from the moratorium.

The language of the Moratorium Act clearly implies that the words "civil proceedings" in the phrase "now indictable or subject to civil proceedings" mean civil proceedings initiated by the Government under the antitrust laws. They do not mean civil proceedings initiated by private parties. When Congress talks about two types of proceedings to which the Act is to apply—one, an indictment, and the other, a civil proceeding—it is talking about proceedings initiated by the Government. The relation of

the words "now indictable" with the words "civil proceedings" in the same phrase clearly suggests an intention to classify things of the same general character in the same phraseology. Accordingly, when Congress mentions civil proceedings with the words "now indictable", it means civil proceedings brought by the Government, and not actions by private persons.*

As already pointed out (pages 18-19 of appellee's original brief) Congress can and did clearly define what it meant when it intended to refer to treble damage suits in Section 5 of the Clayton Act (15 U. S. C. 16). Congress referred to a private action in 15 U. S. C. 15 in this language: "Any person who shall be injured in his business or property by reason of anything *forbidden* in the antitrust laws may *sue*." (Italics supplied) Congress used entirely different language in reference to Government suits.

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*There are a variety of civil proceedings which the Government may institute under the antitrust laws. In addition to suits for injunction and divestiture, there are: (a) Proceedings for contempt of an injunctive decree; these are civil proceedings subject to the three year statute of limitations. *U. S.* v. *Goldman,* 277 U. S. 229, 72 L. Ed. 862, 48 S. Ct. 486 (1928); Cf. *Walling* v. *Crane,* 158 F. 2d 80, 83 (C. C. A. 5) (1946); *Myers* v. *U. S.,* 264 U. S. 95, 68 L. Ed. 577, 44 S. Ct. 272 (1924); *U. S.* v. *United Mine Workers of America,* 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947); *Gompers* v. *U. S.,* 233 U. S. 604, 58 L. Ed. 1115, 34 S. Ct. 693 (1914); (b) Proceedings to forfeit property in transit, under 15 U. S. C. Sections 6 and 11; these are civil proceedings [*Stockwell* v. *U. S.,* 13 Wall 531, 543, 20 L. Ed. 491 (1871); *U. S.* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (1898), affd. 175 U. S. 211, 44 L. Ed. 136 (1899)] governed by a 5-year statute, 28 U. S. C. Sec. 2462; (c) Suits to recover a civil penalty under 15 U. S. C. Sec. 45(1) for disobedience of a cease and desist order of the Federal Trade Commission, which are antitrust proceedings (Cf. 15 U. S. C. Sections 21 and 44) and are subject to the 5-year statute prescribed by 28 U. S. C. Section 2462.

In 15 U. S. C. 4 the word "proceeding" is used to describe civil suits by the Government. In 15 U. S. C. 6 "proceeding" is again used in reference to property forfeiture. In 15 U. S. C. 21, conferring authority on the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board (all governmental agencies) and the Board of Governors of the Federal Reserve System (a quasi-governmental agency) words such as "violations" and "proceeding" repeatedly appear. "Proceeding" is again the chosen word in 15 U. S. C. 21(a) in reference to Federal Trade Commission orders. In 15 U. S. C. 23 "violation" is again used to refer to criminal actions brought by the Government. Both "violations" and "proceedings" are used in 15 U. S. C. 26 to refer to Government actions.

In statutory construction the Supreme Court has a frankly varied set of standards. Consistency in its opinions is found only in relation to types of statutes construed. Only a few examples need be cited where courts gave a construction different from what one party contended was the clear meaning of a statute.

In *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 847, 93 L. Ed. 99 (1948), "possession" of the United States (theretofore construed to include only enumerated islands) was held, for the purposes of the Fair Labor Standards Act, to include land leased by the Government in Bermuda. In *Kordell* v. *United States,* 335 U. S. 345, 93 L. Ed. 73 (1948), labels "accompanying such matters" (under the Pure Food and Drug Act) were held to include literature mailed separately as much as a year after shipment of the goods. In *United States* v. *Adielizzio* (C. C. A. 2nd), 77 F. 2d 841 (1935), one statute (46 U. S. C. A. 687) described

Seaman's Protective Certificates as "certificates of citizenship". Another statute (18 U. S. C. A. 139) made it a crime to falsely or fraudulently procure or possess "any certificate of citizenship". Yet it was held on appeal, after close examination of the statutory wording and legislative history, that the convictions below should be reversed on the ground that falsely procuring a seamen's certificate of citizenship was not falsely procuring a certificate of citizenship. See, also, *Foley Bros.* v. *Filardo,* 336 U. S. 281, 93 L. Ed. 531, 69 S. Ct. 575 (1949); *Matson Navigation Company* v. *War Damage Corporation,* 172 F. 2d 942, (C. A. 9) (1949), cert. den. June 20, 1949, 93 L. Ed. 1466.

This type of statutory interpretation is, in fact, frequently encountered. Even if the construction contended for by appellants might be considered as within the meaning of the words used in the statute, it is plainly at variance with the policy of the legislation, and the courts will follow the legislative purpose. *United States* v. *Rosenbloom Truck,* 315 U. S. 50, 55, 86 L. Ed. 671 (1942); *United States* v. *American Truck,* 310 U. S. 534, 84 L. Ed. 1345 (1940).

(b) RESORT TO LEGISLATIVE HISTORY IS APPROPRIATE TO ASCERTAIN THE MEANING OF THE STATUTE.

Appellants contend that the meaning they ascribe to the words "civil proceedings" is the *only* correct one— and this meaning is "clear". They contend that clear language makes reference to legislative history unnecessary and cite *Ex parte Collett,* 69 Sup. Ct. 944, 93 L. Ed. 901, *Kilpatrick* v. *Texas, etc.,* 69 Sup. Ct. 953, 93 L. Ed. 912, and *United States* v. *National City Lines,* 69 Sup. Ct. 955, 93 L. Ed.

914, all decided May 31, 1949 (Reply Brief, p. 29). All three cases involved interpretation of the words "any civil action" in Section 1404(a) of the Revised Judicial Code (Title 28 U. S. C.). The cases merely hold that this section is applicable to the Federal Employees Liability Act (45 U. S. C. 51-59) (*Collett* and *Kilpatrick*) and to the Sherman Act (15 U. S. C. 1, 2, 4) (*National City Lines*). The problem of interpreting statutes is aptly presented in the *Collett* case where Chief Justice Vinson, although stating the language under consideration was clear, nevertheless devoted five pages to discussion of the legislative history of the statute there involved, to prove that the meaning he attributed to the words was correct.

Appellants claim (Reply Brief, p. 30) that "under any existing statute" in the moratorium statute here involved is "exactly similar" to "any civil action" in the statute involved in *Collett*. This comparison indicates the appellants' misunderstanding of the point involved. The important question before this Court is not the sweep of the words "any existing statute", but it is what actions did Congress mean to cover when it used the modifying, limiting clause "now indictable or subject to civil proceedings". To determine this it is necessary to refer to the legislative history.

This procedure is long recognized and quite permissible under the decision in *Church of Holy Trinity* v. *United States,* 143 U. S. 457, 36 L. Ed. 226, 12 S. Ct. 511 (1892), where it is said:

> "* * * It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and

the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * *

* * * *

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

(c) THE HEARINGS ON S. 2431 ARE NOT PART OF THE LEGISLATIVE HISTORY OF S. 2731 WHICH BECAME THE MORATORIUM ACT.

Appellants contend that appellees' statutory interpretation is "pretentious imagination" and our legislative history a "distorted" and "incomplete" record. Having thus characterized appellees' discussion on this subject, appellants seriously ask this Court to consider and study as part of the legislative history of the moratorium statute excerpts from hearings on another bill (S. 2431) which was separate and distinct from the moratorium bill. The statement at page 37 of appellants' brief that the proposal was never enacted into law is incorrect. It was, in substance, enacted into law as Section 12 of the Small Business Mobilization Act,

June 11, 1942, Public Law No. 603, 77th Congress, 2nd Session.*

A careful reading of the hearings on S. 2431, referred to by appellants, discloses that subtantially the same bill as that submitted by Mr. Patterson, Acting Secretary of War, Mr. Forrestal, Acting Secretary of the Navy, and Mr. Nelson, Chairman, War Production Board, to Senator Van Nuys, Chairman, Committee on the Judiciary, United States Senate, had been passed by the House as an amendment to the Small Business Mobilization Bill, which already had been passed by the Senate. As a consequence, that measure was in conference between the conferees of the Senate and the House at the time hearings on S. 2431 were

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*Sec. 12. Whenever the Chairman of the War Production Board shall, after consultation with the Attorney General, find, and so certify to the Attorney General in writing, that the doing of any act or thing, or the omission to do any act or thing, by one or more persons during the period that this section is in effect, in compliance with any request or approval made by the Chairman in writing, is requisite to the prosecution of the war, such act, thing or omission shall be deemed in the public interest and no prosecution or *civil action* shall be commenced with reference thereto under the anti-trust laws of the United States or the Federal Trade Commission Act. Such finding and certificate may in his discretion be withdrawn at any time by the Chairman by giving notice of such withdrawal to the Attorney General, whereupon the provisions of this section shall not apply to any subsequent act or omission by reason of such finding or certificate.

* * * * * * *

This section shall remain in force until six months after the termination of the present war or until such earlier time as the Congress by concurrent resolution or the President may designate, but no prosecution or *civil action* shall be commenced thereafter with reference to any act or omission occurring prior thereto if such prosecution or *civil action* would be barred by this section if it remained in force. [June 11, 1942, Public Law No. 603, Sec. 12, 77th Cong., 2nd Sess.] (Italics supplied.)

held. Notice of this Hearing was given in the Senate the day before the hearing was held and that the "reason for the bill in the first place would be examined." Accordingly, the conference members of both Houses were invited to be present in order to learn more clearly the reasons for the legislation. Those who appeared and presented statements concerning the measure were Hon. Francis Biddle, Hon. Robert Patterson, and Hon. William R. Boyd, Jr. The hearing on S. 2431, therefore, was for the purpose of assisting the conferees of both Houses in determining what should be done with the amendment to the Small Business Mobilization Bill which was added by the House after the bill had passed the Senate.* This is clearly indicated also by the statement of the Attorney General at Page 12 of the hearing that he had in mind the later promotion and passage of a bill to suspend the statute of limitations as it applied to Government suits under the antitrust laws even though the measure then under consideration was enacted. He said:

> "May I say one other thing, Mr. Chairman, before I come to the discussion of the bill before us, and that is that another expression of part of that general plan was the passage of the statute of limitations recommended by the President in his release.
>
> "That statute has not been passed. It would be a modification of the present statute of limitations so as to apply not only to cases of fraud, as incorporated in Judge Sumner's bill, H.R. 6484, which was introduced before this other plan had come up for discussion, but it also, of course, specifically covers the Antitrust Act.

*See Pages 5 and 6 of the hearings before the Sub-Committee of the Committee on the Judiciary, United States Senate, S. 2431, May 28, 1942, 77th Congress, 2nd Session.

> "I know that this is not the place to discuss that now, but I hope, Mr. Chairman, you will bear that in mind. I think it is very important to have the whole picture properly developed, and the statute expanding the statute of limitations should be a balanced part of the general program.
>
> "Senator O'Mahoney. Do you have a copy of Judge Sumner's bill?
>
> "Mr. Biddle. I have a copy of it.
>
> "Senator O'Mahoney. May I suggest that you insert it in the record at this point?
>
> "Mr. Biddle. I will be very glad to submit this H.R. 6484. That, as I say, applies to frauds against the Government but does not cover the Antitrust Act."

In connection with this latter statement it is significant to note that the Senate and House Judiciary Committees in reporting S. 2731 to the House with the recommendation that the bill be passed said:

> "This committee has previously reported favorably the bill (H.R. 6484) to suspend the running of the statute of limitations applicable to frauds against the United States, which bill has been enacted into law, approved by the President and is Public Law No. 706. This bill (S. 2731) will accomplish the same purpose as to violations of the antitrust laws, both civil and criminal."

The foregoing clearly shows that the Senate Committee on the Judiciary had under consideration a bill which did not relate to the moratorium statute, which was considered separate and apart from any suspension of the statute of

limitations, and which was enacted four months before the moratorium statute was enacted. All this was done in the light of the information given by the Attorney General that the moratorium statute would be later attended to. It is ludicrous therefore for Appellants to contend at Page 37 of their brief that the moratorium statute was but a compromise of S. 2413, or at Page 38 that the moratorium statute gave virtually the same security as S. 2413. As heretofore indicated, the intent and purpose of the Patterson Bill and of Section 12 of the Small Business Mobilization Act was to exempt certain acts or things certified by the Chairman of the War Production Board to the Attorney General from the provisions of the antitrust laws. The acts and things to be exempted were the acts or things which the War Production Board decreed should be done in the future. The quotations from the hearings on S. 2413 in appellants' brief do show that the Senate intended to absolve business from private actions as well as Government proceedings. And the statute carefully referred to "civil actions" as well as prosecutions to show this interest. On the other hand, the Moratorium Act did not exempt from the antitrust laws any specific acts. It merely suspended the application of the statute to acts or conduct which are "now indictable or subject to civil proceedings" by the United States Government.

In the light of the foregoing, it is misleading and wholly unfair to suggest to this Court that it consider as part of the legislative history of the moratorium statute the hearings on a bill which was enacted before the moratorium statute was passed, and which had no positive relation to any suspension of the statute of limitations.

(d) THE LEGISLATIVE HISTORY OF THE MORATORIUM ACT DISPELS ANY DOUBT THAT IT IS NOT APPLICABLE TO PRIVATE ACTIONS.

In this appellee's original brief, it set forth in some detail the legislative history of the moratorium statute in order to show that the object and intention of the Congress in enacting it was to provide only for the suspension of the statute of limitations as it may apply to Government suits for violation of the antitrust laws which had been deferred in order to eliminate interference with the war effort. The discussion was confined to the respective reports of the Senate and House Judiciary Committees on the bill when they presented it to Congress with a recommendation for its enactment, plus some slight reference to debates on the bill before the House.

Without repeating what was stated in the original brief, a few supplemental points will aid in dispelling the confusion which appellants sought to engender.

As appellants state (Reply Brief p. 32), an arrangement between the Secretary of War, the Secretary of the Navy and the Attorney General went into effect on March 20, 1942, whereby suits by the Government against violators of the antitrust laws could be deferred in any case where their prosecution would seriously interfere with the war effort. It was not intended, as appellants admit, that the arrangement would extend to private actions for treble damages. The parties to the agreement, in advising the President on March 20, 1942 of its adoption, said: "To make sure that no one escapes by the running of the statute of limitations, we shall request Congress to pass an appropriate extension of the statute." The President, in his letter of March 20 approving the arrangement, stated: "I

note from your memorandum that proper steps will be taken to avoid the running of the statute of limitations in any case." These two letters appear in both the Senate and House Judiciary Committee Reports.

Thus it clearly appears from the Reports that the parties to the agreement and the President were of the express view that any suspension of the statute of limitations would necessarily have to apply only to proceedings initiated by the Government.

In a letter dated August 18, 1942 sent by the Secretary of War, the Secretary of the Navy and the Attorney General to the Speaker of the House, recommending the enactment of S. 2731 and which was also included in the Senate and House Reports, they said:

> "* * * A procedure was set up under which antitrust investigations, prosecutions, or suits would be postponed if it appeared that proceeding therewith would seriously interfere with the war effort. *In such letter we anounced our intention to request the Congress to pass an appropriate extension of the statute of limitations applicable to antitrust cases.* A copy of the above-mentioned letter and a copy of the President's reply, which approved the proposed procedure, are enclosed herewith." (Italics supplied)

Further indication that the Moratorium Act was intended by Congress to apply only to Government prosecutions and proceedings is found in the title to the act which extended the moratorium from June 30, 1945 to June 30, 1946. The title of Public Law No. 107, 79th Congress, 1st Session, reads: "An Act to amend the Act suspending until June 30, 1945, the running of the statute of limitations applicable to violations of the antitrust laws, so as to continue such suspension until June 30, 1946".

It is quite clear, therefore, that an examination of the two Reports clearly shows (1) that the proposers of S. 2731 intended that the statute of limitations be suspended only as to cases which were deferred under the arrangement of March 20, 1942, (2) that the members of each of the Senate and House Judiciary Committees clearly understood what was proposed, (3) that they understood that the "bill will accomplish the same purpose as to violations of the anti-trust laws, both civil and criminal" as did Public Law 706 with respect to fraud against the Government, (4) that nowhere in the Reports of the Judiciary Committees is there a suggestion or implication that they intended to cover actions by private parties, and (5) that each of the Committees reported that the bill be passed in the form submitted to them. It is significant that the bill was passed without change.

There was no purpose to be served by suspending any statute of limitations applicable to private actions. There was a purpose to the statute to enable the Government to carry out the "gentlemen's agreement" to defer prosecutions until after the war. Even if private actions could be considered "within the letter of the statute" they are "not within the statute, because not within its spirit, nor within the intention of its makers". *Church of Holy Trinity* v. *United States, supra.*

When Congress enacted Section 12 of the Small Business Mobilization Act in June 1942, it intended it to be applicable to both Government proceedings and private actions. And it used the term "civil action" to show it included private actions. When it enacted the Moratorium Act a few months later in October 1942, it used different language "civil proceeding" to show the limitation intended.

This was entirely consistent with the distinction in the meaning of those words which Congress has followed throughout the antitrust laws.

Respectfully submitted,

JOSEPH W. BURNS
Fulton, Walter & Halley

MICHAEL F. McCARTHY
Oliver & Donnally

CHARLES A. BEARDSLEY
Attorneys for Appellee American Potash & Chemical Corporation

Dated: September 30, 1949.

Due service and receipt of a copy of the within is hereby admitted this day of , 1949.

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Attorneys for Appellants